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No. 00-957

IN THE
Supreme Court of the United States

KANSAS,
Petitioner,
v.
MICHAEL T. CRANE,
Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The American Psychiatric Association (APA), with approximately 42,000 members, is the Nation's leading organization of physicians specializing in psychiatry. The APA has participated in numerous cases involving mental-health issues in this Court, including *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999), *Kansas v. Hendricks*, 521 U.S. 346 (1997), *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Washington v. Harper*, 494 U.S. 210 (1990), *Allen v. Illinois*, 478 U.S. 364 (1986), and *Addington v. Texas*, 441 U.S. 418 (1979).[1] The American Academy of Psychiatry and the Law,

[1] No party authored this brief in whole or in part, and no person except *amici* and their members made a monetary contribution to the preparation

an organization of approximately 2500 psychiatrists dedicated to excellence in practice, teaching, and research in forensic psychiatry, has participated as *amicus* in, *e.g.*, *Penry v. Johnson*, 121 S. Ct. 1910 (2001), and *Jaffee v. Redmond*, 518 U.S. 1 (1996). Presenting information about diagnosis, recidivism, treatment, and other issues, the organizations here seek to ensure that psychiatric hospitalization is reserved for proper care and treatment of patients, not used for preventive detention as a substitute for the criminal justice system.

STATEMENT

This case involves the Kansas statute that was at issue in *Kansas v. Hendricks*, 521 U.S. 346 (1997)—the Sexually Violent Predator Act, enacted in 1994. This case, like *Hendricks*, also involves an application of that statute based on acts committed prior to the statute's enactment. Pet. App. 13a. The facts of the two cases, however, are significantly different, requiring the State of Kansas, in the state courts and in this Court, to make a much more sweeping claim of state power to confine individuals for preventive purposes than this Court approved in *Hendricks*.

In 1993, respondent Crane, roughly 31 years old at the time (JA 68), exposed himself at a tanning salon and, half an hour later, committed an attack on a video-store clerk, trying to force her to perform oral sex and stating that he would rape her (then abruptly running off). Pet. App. 2a-3a; *see State v. Crane*, 918 P.2d 1256, 1258-59 (Kan. 1996) (describing evidence). For the first incident, he was convicted of the misdemeanor of lewd and lascivious behavior. Pet. App. 2a; JA 12. For the second incident, he was convicted of several felonies and sentenced to prison for 35 years to life, but those convictions were overturned on appeal in 1996 as jurisdictionally defective based on the State's failure to charge the necessary elements. *Crane*, 918 P.2d at 1258, 1265-69.

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or submission of this brief. S. Ct. R. 37.6. The parties have filed letters giving blanket consent to the filing of *amicus* briefs.

The State, having lost its ability to pursue the original serious charges, entered into a plea agreement with Crane in August 1997. Under the agreement, Crane pled guilty to the lesser offense of aggravated sexual battery. He received a very short sentence, with a conditional release date set for only a few months later, in January 1998, because he had already "served nearly as much time as could be imposed for his conduct." Pet. App. 2a-3a, 15a.

The month before Crane's January 1998 release, the State filed a petition to confine him as a sexually violent predator under the Kansas Act. JA 1; Pet. App. 19a. The trial court, after finding probable cause to believe that Crane qualified as a sexual predator, ordered him sent to the Larned State Security Hospital for evaluation. Pet. App. 22a; Pet. Br. 2-3. In late February, while the evaluation was under way, the trial court rejected Crane's motion for summary judgment and ruled that the State need not "prove the existence of a mental disorder that so impairs the volitional control of [Crane] as to render him unable to control his dangerous behavior," but "must only prove the existence of a mental disorder that makes [him] likely to reoffend." Pet. App. 23a; *id.* (noting Crane's summary-judgment contention that "the State has no evidence he committed any sexual act while his volitional control was impaired by any mental disorder to the degree he was unable to control his dangerous behavior" and stating: "the facts stated in [Crane's] motion are uncontroverted").

On March 2, 1998, two state employees at Larned—Dr. Leonardo Mabugat, a psychiatrist, and Mr. Kenneth Eaves, a psychologist—produced a written evaluation. That evaluation (JA 11-20) was referred to during the subsequent trial (*e.g.*, JA 78) but does not seem to have been admitted into evidence (Pet. Br. 3-4).[2] The authors, however, along with

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[2] The evaluation, as Kansas observes (Pet. Br. 3-4), identified a collection of prior criminal arrests, charges, and convictions (one conviction, from 12 years earlier, was for a sexual offense, *see* JA 12-16);

two other mental-health professionals (Robert Heurter and Douglas Hippe, both psychologists), testified for the State at the subsequent trial.

The testimony relied on the standard diagnostic catalog—the current edition is the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition—Text Revision* (2000) ("*DSM-IV-TR*")—which was described at trial as a tool used to promote uniformity in communicating about "personality, medical problems, social problems, and the like" (JA 105). The State's witnesses asserted that Crane came within two *DSM* categories, exhibitionism and antisocial personality disorder. *See* JA 46-49, 71, 89, 110-16; *DSM-IV-TR* at 569 (exhibitionism: exposure to unsuspecting strangers), 701-06 (antisocial personality disorder: "pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood").[3] Exhibitionism alone would not render Crane

noted Crane's participation in group therapy in prison but not in sex offender treatment (JA 17); stated a diagnosis of exhibitionism and antisocial personality disorder (JA 19); and opined that the antisocial personality disorder "would account for [Crane's] aggression toward women" (JA 19), which "has been sexual in that it has proceeded progressively from his exhibitionistic behavior" (JA 20), and that Crane would be a sexually violent predator under the statute if the list of arrests, charges, and convictions were accurate but would not be if the 1993 video-store attack were considered by itself (JA 20).

[3] The diagnostic criteria—aside from requiring that the person be 18 and have shown comparable misconduct before 15 and not engage in the misconduct only because of schizophrenia or a manic episode—are stated in *DSM-IV-TR* (at 706) as follows (punctuation added). "There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to

dangerous (JA 94-95, 98, 117), but the antisocial personal disorder diagnosis evidenced by Crane's criminal record—a condition based on "enduring traits . . . that cause enduring trouble, enduring difficulties either with the law or psychologically, personally, or in the community in some way" (JA 111), and "relatively unchangeable" (JA 112), "extremely difficult to treat, very intractable, not likely to change" (JA 118)—made a critical difference in qualifying Crane as a sexual predator under the Kansas statute (JA 52, 118).[4] *See* Pet. App. 3a. The likelihood of re-offending was variously estimated at just barely 50% (JA 67) and 85-90% (JA 121). The State's professional witnesses, without difficulty understanding the concept, testified that, though antisocial personality disorder may affect the ability to control behavior, it does not generally and did not in Crane's case mean an inability to control behavior. JA 56-57, 70, 99.[5] Indeed, Mr. Hippe reported that (in direct contrast to the testimony of Hendricks in the *Hendricks* case) Crane told him that he

plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another."

[4] With respect to the observation (*DSM-IV-TR* at 704) that antisocial personality disorder "may" be less in evidence as an individual ages into the fourth decade and beyond, one witness stated that it was not likely to diminish in Crane's case because the condition was evident in his 30s (JA 76), and another witness noted the "may" in the *DSM* observation and stated that a limited literature merely suggested, but did not substantiate, such mellowing in the 45-55 age range (JA 135-136).

[5] Although Dr. Mabugat, when initially asked by the State if Crane "can't control" or "won't control" his behavior, asserted that "it's a combination" (JA 51)—as the Kansas Supreme Court observed (Pet. App. 10a)—he later agreed that Crane's "disorders do not affect his volitional control to the degree that he cannot control his behavior." JA 70; *see* JA 71-73.

could control his behavior. JA 117. *See also* Pet. App. 24a (denying summary judgment to Crane "even though the State's expert witnesses might agree that [Crane's] mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior").

In the conference about jury instructions, the State acknowledged that this case was different from the *Hendricks* case. It stated (with overbreadth) that "pedophilia is something that affects a person's volitional control to the point where they cannot control it. This is a completely different situation . . . ." JA 141. Accordingly, the State argued that this Court's *Hendricks* decision was not limited to the particular facts of the case; rather, "the statute, as a whole, is what the Supreme Court addressed in the *Hendricks* case." JA 140.

The instructions given to the jury recited the threshold element of a conviction of a sexually violent offense—which was met, as a matter of law, by the aggravated sexual battery conviction entered against Crane under the plea agreement. JA 156. The instructions then permitted an adverse finding if the jury found that Crane had either a "mental abnormality" or a "personality disorder" that makes him "likely to engage in future predatory acts of sexual violence" if not securely confined, *i.e.*, such acts were "more probable to occur than not to occur." JA 156, 157. The only real question for the jury was this likelihood question, because the jury was told that the "personality disorder" standard was satisfied by any "personality disorder" recognized in *DSM*, such as "antisocial personality disorder" (JA 157)—which applied to Crane, according to the uniform testimony. Though essentially a moot point, the jury was also allowed to find a "mental abnormality"—any condition "affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others," with "volition" meaning "act of willing or exercise of the will." JA 156, 157.

The instructions, in short, imposed no requirement whatever of impaired ability to control one's behavior.

On appeal, the Kansas Supreme Court reversed the adverse finding, concluding that the statute could not constitutionally be applied "absent a finding that a defendant suffers from a volitional impairment," and remanded for a new trial. Pet. App. 2a, 2a-20a. The court relied on the fact that this Court's *Hendricks* decision, involving a man who "admitted . . . that he was unable to control the urge" to abuse children sexually (*id.* at 6a, citing *Hendricks*, 521 U.S. at 355, 360), "is replete with references to the commitment of persons who cannot control their own behavior" both in discussing due process (*id.* (citing *Hendricks*, 521 U.S. at 357, 358, 360, 362, 364); *id.* at 6a-8a) and in discussing the non-criminal character of the statute to reject the ex post facto and double jeopardy challenges (*id. at* 12a-13a (citing *Hendricks*, 521 U.S. at 362-63, 364)). The court concluded that the Constitution requires "a finding that the defendant cannot control his dangerous behavior," a finding of "inability to control his behavior." *Id.* at 11a, 12a. The failure to demand such a finding in the jury instructions required reversal and a new trial. *Id.* at 12a, 20a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Individuals who commit sex offenses commonly are criminals who should be held criminally responsible for their willful acts. The State, through its legislature and its prosecutors, should bring to bear its criminal-justice system, with its constitutional limits (*e.g.*, against ex post facto punishment and double jeopardy), to impose appropriately severe punishment on such individuals. What the State should not be permitted to do under the Constitution is to evade the criminal-justice system, when dissatisfied with decisions it has made, by setting up an alternative regime broadly authorizing the indefinite locking up of individuals based on risk of future offenses—outside the *parens-patriae-*

based tradition of medically justified civil commitment for those suffering severe mental illnesses, and in disregard of the tight limits on permitted preventive detention. The State in the present case asks for this Court's approval of just such a broad regime, thereby breaching fundamental limits protecting liberty in our society.

The request should be rejected. The Court has made clear that "'the concept of ordered liberty'" severely limits the circumstances in which a State may deprive people of their physical freedom by imprisoning them—principally as punishment upon a proper criminal conviction. *United States v. Salerno*, 481 U.S. 739, 746 (1987); *see Zadvydas v. Davis*, 121 S. Ct. 2491, 2498-99 (2001). Kansas, not able to justify Crane's confinement as criminal, must bring it within some other principle defining one of the narrow circumstances justifying civil confinement. Kansas, however, has not presented any justification that would not equally justify further preventive detention of a large share of prisoners after they have served their sentences, thus substantially displacing the criminal-justice system.

Mere dangerousness in the sense of likely recidivism has never been enough, as Kansas does not dispute. Where highly certain, imminent, grave harm is not at issue, prediction of reoffense is only a matter of general and uncertain probabilities. Likely recidivism, the best that can be done in circumstances like the present, would not meaningfully limit the class of individuals subject to preventive confinement.

Nor is such limitation supplied by mere applicability of *some* recognized diagnostic category in *DSM* as the source of likely recidivism. The Court in *Hendricks* rejected the notion that constitutional justifications follow either labels ("mental illness" versus, say, "mental abnormality") or *DSM* diagnostic categories, which are designed for purposes other than justifying confinement. Of particular importance here, permitting confinement of all dangerous individuals with

"antisocial personality disorder" (a *DSM* category) not only has effectively been rejected by this Court in *Foucha v. Louisiana*, 504 U.S. 71 (1992), but would, as a factual matter, not meaningfully circumscribe the reach of preventive detention. The constitutionally valid tradition of civil commitment for "harm-threatening mental illness" (*Zadvydas*, 121 S. Ct at 2499) must incorporate a substantive standard for the mental-illness component (by whatever name), beyond mere listing in *DSM*.

One such principle, which reflects the distinctive characteristic of the tradition of civil commitment of the mentally ill (as urged by the APA in *Hendricks*), is that the confinement be a medically justifiable one for the good of the individual, hence an exercise not only of the State's police power (to protect the public against predictable danger) but, also, of the State's *parens patriae* power. Putting aside (what is not at issue here) cases involving severe cognitive impairment or highly certain imminent grave danger, this must mean confinement only for providing available treatment effective enough to hold a realistic promise of release (followed by further treatment in less restrictive settings). Kansas does not rely on any such standard, but instead invokes "treatment" simply in the sense of something a doctor or other professional can do to a person in the hope of changing him—there being no known reliably effective treatments in the sense relevant here, *i.e.*, so reducing recidivism risk as to lead to a determination of safety for release. Such invocation of "treatment," like mere invocation of any *DSM* category, neither furnishes a *parens patriae* medical justification for confinement nor meaning-fully limits the class of offenders subject to confinement, for the evidence of available "treatment" is not meaningfully different for offenders generally.

This Court, in *Hendricks*, pointedly relied on another substantive limiting principle, seizing on the highly unusual fact that Hendricks was dangerous because of a deviant

sexual condition, pedophilia, that he confessed made him unable to control his criminal conduct. That fact both made imminent danger highly certain and made Hendricks an extreme case of inability to control the behavior causing harm—in both respects making Hendricks analogous to a person with a highly contagious disease who presents an imminent danger not traceable to voluntary human action. While volitional impairment in general has not been subject to measurement or calibration across the spectrum of human behavior, *Hendricks* itself establishes both the coherence of the concept and its usefulness in extreme cases. In this case, with neither this limiting principle nor any other having been used as the basis for confinement, the commitment of Crane was properly set aside by the Kansas Supreme Court.

ARGUMENT

THE KANSAS SUPREME COURT'S INVALIDATION OF CRANE'S COMMITMENT SHOULD BE AFFIRMED

This Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), frames the analysis in this case. That decision pervasively, and pointedly, focuses on the distinctive facts bringing Hendricks's confinement within the narrow circumstances in which the constitutionally protected tradition of ordered liberty permits civil confinement in a secure institution. Kansas, in confining Crane, has repudiated both the *Hendricks* basis for limiting such confinement and any other meaningful limiting principle. For that reason, the Kansas Supreme Court was correct in setting aside, for retrial under more demanding standards, the commitment of respondent Crane under the Kansas Sexually Violent Predator Act.

A. *Kansas v. Hendricks* Relied Centrally On Hendricks's Confessed Inability To Control His Harmful Conduct

The most striking evidence in *Hendricks* was Hendricks's own testimony, as this Court stated, that he "'can't control the urge' to molest children," so that "the only sure way he could keep from sexually abusing children in the future was 'to die.'" 521 U.S. at 355. Kansas, in defending its confinement of Hendricks under its statute, emphasized that testimony in its statement of facts. Pet. Br. 9, 10, 10, 11 in *Hendricks*. Nevertheless, the State did not affirmatively rely on Hendricks's inability to control his conduct as a basis for its argument defending the statute in its briefs as petitioner (on the due process issue) or as cross-respondent (on ex post facto and double jeopardy). *See* Pet. Br. 20-50 in *Hendricks*; Cross-Resp. Br. 3-39 in *Hendricks*; *see id.* at 39-49 (equal protection); *cf.* Pet. Br. 22 in *Hendricks* (quoting the "utter lack of power to control" and "uncontrollable" language characterizing the statute upheld in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940)). In its reply brief on the due process question, however, when offering an explanation of why the class of sex offenders covered by its statute was appropriately narrow, and thus escaped condemnation under the reasoning of *Foucha*, *supra*, the State deemed it "important" that the Kansas statute's limitation to "sexual predation" reasonably targeted "a disturbed mental condition which, if it persists, is likely to lead to irrational *and irresistible* urges to harm additional victims." Reply Br. 9 in *Hendricks* (emphasis added).

This Court, upon deciding the case, seized on that precise feature, made applicable in the Hendricks case by the stark admission of Hendricks himself, and relied on it pervasively in upholding Hendricks's confinement against constitutional challenge. Thus, having described the crucial testimony (521 U.S. at 355), the Court incorporated the inability-to-control principle into its very first paragraph of legal analysis, which

defined why the Kansas statute, as applied to Hendricks, was consistent with the Nation's "understanding of ordered liberty" protected as a matter of substantive due process. *Id.* at 357. Quoting *Foucha* for its affirmation that "freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause'" (*id.* at 356), along with the recognition of *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905), that the freedom is not absolute, the Court stated the principle that validated the Hendricks confinement: "States have in certain narrow circumstances provided for the forcible civil detainment of people *who are unable to control their behavior* and who thereby post a danger to the public health and safety," "a limited subclass of dangerous persons." *Id.* at 357 (emphasis added).

The Court repeatedly stressed the same critical fact, as its understanding of the Kansas statute, in rejecting the due-process challenge. The Court observed that Kansas's requirements "serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous *beyond their control*." *Id.* at 358 (emphasis added). The Court described the statute as requiring a condition that "makes it difficult, if not impossible, for the person to control his dangerous behavior,"and then stated its understanding that this requirement "narrows the class of persons eligible for confinement to those *who are unable to control* their dangerousness." *Id.* (emphasis added). The Court rejected Hendricks's demand that legal definitions and standards "mirror those advanced by the medical profession." *Id.* at 359.[6] Rather, labels aside, what was critical was that

[6] The APA explained in its *amicus* brief in *Hendricks* (at 22-23 (footnote omitted)): "Just as state legislative dictates cannot control the standard of 'mental illness' justifying involuntary confinement, so, too, the standard cannot be controlled by the categories set forth in [*DSM-IV* (1994) or other classification systems]. Such catalogues include a vast range of disorders that vary widely in severity and type of impairment (*e.g.*, cognitive, mood, sexual, eating, learning, sleep, adjustment, etc.).

the Kansas statute contained substantive criteria like those in earlier laws "relating to an individual's inability to control his dangerousness" (*id.* at 360), that Hendricks himself suffered from the well-recognized "serious mental disorder" of pedophilia (*id.*), and that "Hendricks even conceded that, when he becomes 'stressed out,' he cannot 'control the urge' to molest children." *Id.* It was precisely "[t]his admitted *lack of volitional control*" that, together with dangerousness, "adequately distinguishe[d] Hendricks from other dangerous

The classification schemes are developed and periodically altered, through comprehensive field trials, research, and analysis, to serve diagnostic and statistical functions, forming a common (and always imperfect) language for gathering clinical data and for communication among mental health professionals. *DSM-IV* at xv-xxv. These schemes are designed to identify the full range of mental disorders, each (according to the inevitably imprecise definition)

> a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.

[*DSM-IV* at xxi.]

"Such comprehensive classification schemes are not restricted to identifying those persons who warrant involuntary treatment, let alone confinement. Nor are they designed to identify those subject to various legal standards, such as those for involuntary confinement. Thus, the authors of *DSM-IV* caution that '[i]n most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder," "mental disability," "mental disease," or "mental defect."' *DSM-IV* at xxiii. The authors further caution that 'a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder.' *Id.* Not all individuals who come with a *DSM-IV* category suffer an impairment that diminishes their autonomy, much less one justifying involuntary confinement for the individual's own good."

persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.* (emphasis added).

The Court relied on the same critical factor in rejecting the ex post facto and double jeopardy challenges. The Court concluded that the Kansas legislature did not intend its statute "to function as a deterrent" (a criminal-law objective) because it targets only persons with a condition "that prevents them from exercising *adequate control over their behavior*," persons who are "unlikely to be deterrred by the threat of confinement." *Id.* at 362-63 (emphasis added). More indirectly, the Court concluded that incapacitation alone *can* be a justified civil objective by invoking an analogy to harm effected other than through voluntary human action—quarantining "persons afflicted with an untreatable, highly contagious disease." *Id.* at 366 (citing *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. Of Health*, 186 U.S. 380 (1902)).

Justice Kennedy, in his concurrence, noted that the Court's analysis "concerns Hendricks alone." *Id.* at 371.[7] He also warned against such laws' being used to displace the criminal system (*id.* at 372-73), thus echoing the majority's emphasis of the characteristic distinguishing Hendricks from "other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings" (*id.* at 360). Justice Breyer's dissent, noting the wide area of agreement with the majority, stressed the distinctive fact of Hendricks's "specific, serious, and highly unusual inability to control his actions" (*id.* at 375), making his a "classic case of irresistible impulse" (*id.* at 376).

In sum, the Court relied centrally on the circumstances bringing Hendricks's case within a narrow category of

[7] *Hendricks* did not, because it could not, rule on the application of the challenged law to circumstances not presented. Neither a facial validating of a law nor a rejection of a challenge to its application in one circumstances determines the validity of the law in different applications.

nonpunitive civil confinement: Hendricks's highly unusual, confessed inability to stop himself from recommitting serious offenses in highly likely circumstances, thus necessarily and without significant uncertainty presenting a grave near-term threat. It was on that basis that the Court judged the State's interests nonpunitive and sufficiently akin to traditionally justified civil confinement to pass muster against due process, ex post facto, and double jeopardy challenges.

B. Crane Was Committed Under Standards Lacking Any Meaningful Limiting Principle To Distinguish General Preventive Detention Of Offenders

1. This Court has made clear the fundamental, essentially liberty-defining character of freedom from confinement in our system of "ordered liberty." *Hendricks*, 521 U.S. at 357; *Foucha*, 504 U.S. at 80; *Salerno*, 481 U.S. at 746. Based on that recognition, the Court has likewise made clear that due process permits physical restraint in the form of confinement, outside the context of punishment upon criminal conviction, only in "narrow" circumstances—as reiterated just recently in *Zadvydas*, 121 S. Ct. at 2498-99:

> Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746 (1987), or, in certain special and "narrow" non-punitive "circumstances," *Foucha*, *supra*, at 80, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

* * * *

> [W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. *Compare Hendricks*, *supra*, at 368 (upholding scheme that imposes detention upon "a small segment of particularly dangerous individuals" and provides "strict procedural safeguards") and *Salerno*, *supra*, at 747, 750-752 (in upholding pretrial detention, stressing "stringent time limitations," the fact that detention is reserved for the "most serious of crimes," the requirement of proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards), with *Foucha*, *supra*, at 81-83 (striking down insanity-related detention system that placed burden on detainee to prove nondangerousness). In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger. *See Hendricks*, *supra*, at 358, 368.

For this principle to be meaningful, a State's basis for civil confinement must be deemed insufficiently limiting when it would substantially displace the criminal-justice system by applying to a large share of offenders, confining them indefinitely even after completion of their sentences, or as a substitute for criminal sentencing altogether (if the offense were used merely as evidence of dangerousness). *See Foucha*, 504 U.S. at 76 n.4, 82-83; *cf. Hendricks*, 521 U.S. at 360 *id.* at 372-73 (Kennedy, J., concurring).[8]

2. The State of Kansas does not defend its confinement of Crane based solely on his dangerousness in the sense that he

[8] In the present case, the confinement scheme was used precisely as a means of making up for the State's failure in successfully pressing sufficiently serious criminal charges for the video-store attack. *See* Pet. App. 4a.

is (in the language of the jury instruction) "likely to engage in future predatory acts of sexual violence." JA 156. Critically, this case, unlike some other situations involving "dangerousness" (obviously a matter of degree, in imminence, severity, and certainty), does not involve either an intrinsically short-term confinement (*Salerno*, *supra*) or the sort of highly certain prediction of truly immediate grave danger that might be made, for example, for certain cases of infectious disease (*see Jacobson*, *supra*) or, even, for some extraordinary cases of imminently dangerous mental illness (whether or not meaningfully treatable). Neither in its statute nor in the instructions given to the jury in this case did Kansas undertake to limit its confinement regime to such acute situations (*see* Pet. Br. 1a-3a (statute); JA 156-57 (pertinent instructions)), and the constitutional power of States to serve their important interests in protecting the public in those situations is therefore not in question. The confinement at issue here is indefinite in theory and (for want of known curative treatments) perhaps in practice; and, as the evidence in this case indicates, psychiatric prediction that someone like Crane presents a near-term threat of serious harm is inherently uncertain. *See, e.g., Heller v. Doe by Doe*, 509 U.S. 312 (1993); *Addington v. Texas*, 441 U.S. 418, 429 (1979); APA *Amicus* Br. in *Hendricks* at 18.

The standard of dangerousness at issue here—generally (but imprecisely) predictable recidivism—does nothing to distinguish the class of sex predators covered by the Kansas statute from offenders generally. A very substantial number of offenders can be predicted to re-offend. For example, a large-scale 1989 study by the United States Department of Justice Bureau of Justice Statistics reported that, in a sample of more than 108,000 persons released from prisons in 1983, "an estimated 62.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.8% were reconvicted, and 41.4% returned to prison or jail," and "22.7% of all prisoners were rearrested for a violent offense within 3 years of their

release." U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* at 1 (April 1989). Dangerousness alone, in the sense of likely reoffense relevant here, thus furnishes no meaningful limiting principle, as Kansas seems to concede.

3. Nor is a meaningful limiting principle provided by adding the mere fact that the dangerousness flows from *some* diagnosis found in the *DSM* catalog. The Court concluded in *Hendricks* that constitutional justification cannot simply follow the *DSM*. And, as the APA there explained (*see* note 6, *supra*; *DSM-IV-TR* at xxxii-xxxiii; *id.* at xxxvii ("Cautionary Statement")), the *DSM* manual is designed for quite different purposes and expressly disclaims any intent to conform its diagnostic categories to legally relevant standards, much less to the circumstances of justified confinement.

More specifically, the presence of "antisocial personality disorder" as the condition causing the danger (*see DSM-IV-TR* at 701-706) provides no meaningful limiting principle. A very substantial number of offenders are diagnosable with antisocial personality disorder, whose "prevalence rates [are] as high as 40-60% among the male sentenced population." Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 Soc. Psychiatry & Psychiatr. Epidemiol. 231, 234 (1999); JA 147 (noting deposition evidence from State's witness suggesting that 75% of prisoners have antisocial personality disorders). Under Kansas's theory, indefinite confinement would be available for a large share of the prison population based on this "chronic condition" (Moran, *supra*, at 234)—definitionally characterized by repeated disregard for the rights of others, including often by commission of offenses, intrinsically carrying a disposition to commit such acts, and not subject to known effective treatment. *See* JA 111, 112, 118 (difficult to change condition); *DSM-IV-TR* at 701-06; Meloy, "Antisocial Personality Disorder," in 2 G. Gabbard, *Treatments of Psychiatric Disorders* 2251-71 (3d ed. 2001).

This Court recognized and effectively rejected this result in *Foucha*, *supra*, which was relied on in *Hendricks* and, more recently, in *Seling v. Young*, 121 S. Ct. 727, 736 (2001), and in *Zadvydas*, 121 S. Ct. at 2498-99. In *Foucha*, the Court took as a given that the petitioner, at the time of the requested release, had been diagnosed by a doctor as having "an antisocial personality," a "disorder for which there is no effective treatment" (504 U.S. at 75, 82) but which has long been recognized as a psychiatric diagnosis.[9] Against that background, the Court made clear that it was a matter of constitutional principle that a person may be held based on his mental condition "as long as he is *both* mentally ill and dangerous, but no longer." 504 U.S. at 77 (emphasis added). Reiterating the insufficiency of dangerousness alone, the Court rejected, to the extent it understood Justice Kennedy in dissent to be advancing, "the proposition that a defendant convicted of a crime and sentenced to a term of years may nevertheless be held indefinitely because of the likelihood that he will commit other crimes." *Id.* at 76 n.4.

Having thus stressed the necessity for mental illness, the Court rejected the State's reliance on Foucha's "antisocial personality," coupled with dangerousness, as sufficient to perpetuate his confinement, apparently indefinitely. The most extensively explained reason was a matter of substantive due process: there was insufficient justification to overcome the basic principle that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* at 80. Foucha, though concededly having a "disorder" (*id.* at 82), was not "mentally ill" within the meaning of, and so

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[9] *See DSM-IV-TR* at 701-06; *see also* Amer. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Third Edition–Revised* 342-46 (1987); Amer. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Third Edition* 317-21 (1980); Amer. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Second Edition* 43 (1968).

could not be held pursuant to, the tradition justifying commitment of the mentally ill. *Id.* at 80. Accordingly, Foucha could be held only if he fit within the "narrow circumstances," reflected in *Salerno*, *supra*, where "limited confinement" is permitted *simply* to avert "a danger to others or to the community." 504 U.S. at 80; *see id.* at 83 ("'In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'") (quoting *Salerno*, 481 U.S. at 755). Louisiana's statute failed to come within those narrow circumstances (504 U.S. at 82-83):

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

4. a. A limiting principle underlies the tradition of civil commitment based on serious mental impairments, though it is not one Kansas has invoked here. That tradition historically rests in part on the State's police power, its basic power to protect the public—in this context, against the reality of certain dangerous individuals. Critically, though, putting aside the narrow class of the most certainly and acutely threatening individuals who might be locked up simply to protect the public—a class to which, as noted, Kansas has not in fact limited its confinement regime—the civil-commitment tradition has *also* required that the State be exercising its *parens patriae* power, *i.e.*, its power to act *in the interest of*

the individual by displacing his own judgments about hospitalization in certain circumstances. For cases like this one, therefore, as Kansas itself notes in describing *Addington*, involuntary commitment has traditionally required a determination that the individual "requires hospitalization *for his own welfare and* protection of others." Pet. Br. 17 n.4 (emphasis added). Mental illness has been a *distinctive* basis for detention of adults in our tradition precisely because (a) "[o]ne who is suffering from a debilitating mental illness" is not "wholly at liberty" (*Addington*, 441 U.S. at 429) and (b) the State is acting not for "the destruction of their liberties" but for a "beneficient function" (*Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 7 (1890)), furthering its "*parens patriae* interest in preserving and promoting the welfare of the [individual]" (*Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (*parens patriae* power regarding children)).

A *parens patriae* decision about confinement compares the probability of living freely without relapse (but with treatment) against commitment for the period likely in the individual's case, which might be indefinite in the case of a condition not known to be amenable to reliable treatment that would realistically lead to release. The historical tradition of mental-illness civil commitment has always required, where "dangerousness" means only the likely recidivism at issue here, a clear basis for concluding, making that comparison, that the confinement in a secure facility is better *for the individual* than the alternative. That comparison, of course, might more readily justify confinement in the first instance if the standards for release thereafter did not demand the kind of guarantee of "safe[ty]" Kansas seemingly demands (Kan. Stat. Ann. § 59-29a07), but were flexible and based on professional judgments assessing the appropriateness of continued confinement versus treatment in the outpatient settings in which the individual must learn to live without reoffending. *See* APA, *Dangerous Sex Offenders: A Task*

Force Report 62, 65, 68, 69, 73, 75 (1999) ["APA Task Force Report"] (importance of therapeutically monitored adjustment to real-world settings). Putting aside any cases of severe and incurable mental illness that itself undermines meaningful autonomy interests (and the cases of acute danger already noted), the essential requirement of a *parens patriae* confinement justified as in the individual's interest (after making the comparison of alternatives) is the actual availability of treatment holding realistic promise of release in a reasonable time. Any lesser standard for locking someone up unjustifiably overrides self-determination as the essential and defining premise of a free society. *See* APA *Amicus* Brief in *Hendricks* at 20-30; APA Task Force Report 171-75.[10]

Abandonment of a good-of-the-patient requirement in favor of a simple protection-of-the-public standard would not only transform commitment into general and open-ended preventive detention in circumstances where prediction is uncertain. It also would threaten the beneficial tradition of civil commitment itself. The ability of civil commitment to perform its function depends vitally on doctors making judgments *as doctors* for the benefit of their patients, with corresponding flexibility in making medical judgments about conditions and length of confinement and treatment. Turning doctors into jailers changes their role, undermining the therapeutic alliance with their patients that is basic to medicine generally and psychiatry in particular. *See* APA Task Force Report 173 ("[B]y bending civil commitment to serve essentially nonmedical purposes, sexual predator commitment statutes threaten to undermine the legitimacy of the medical model of commitment.").

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[10] The Court's decision in *Allen v. Illinois*, 478 U.S. 364 (1986), involved an individual who was severely "mentally ill" in the usual civil-commitment sense (*id.* at 366), requiring treatment for a psychosis, *i.e.*, schizophrenia. *See* APA *Amicus* Br. in *Hendricks* at 16 & n.12.

b. Kansas, relying on information presented in the brief of *amicus* Association for the Treatment of Sexual Abusers (ATSA), suggests (without quite arguing) the much broader view that the mere fact that some "treatment" is available for some sex offenders may justify confinement. *See* Pet. Br. 28-30. ATSA (at 9-10) describes the several types of treatment, including "cognitive-behavioral" therapies and pharmaceutical therapies, that may be provided to *some* individuals with sexual disorders. *See* APA *Amicus* Br. in *Hendricks* at 28-29 & n.26; APA Task Force Report 61-75, 103-20; General Accounting Office, *Sex Offender Treatment: Research Results Inconclusive About What Works to Reduce Recidivism* (1996). On the crucial matter of effectiveness, ATSA, after observing that "currently there is no 'cure' for sexual predation," makes only the carefully qualified summary of the literature: "Although treatment is still a developing field, recent research *suggests* that it *might* be *effective* for *high-risk* offenders." ATSA *Amicus* Br. 8 (emphases added).

The limitations in this statement are crucial to understanding how little is being asserted. ATSA's observations about "treatment" do not separate, among sex "offenders," those with a recognized mental illness (let alone a sex-related disorder) from those without (*e.g.*, there is no recognized mental illness of "rapism," *but cf.* Pet. Br. 23 n.10).[11] It does not indicate which subgroups have treatments available and which do not, even while ATSA notes that "[s]exual predators are far from a homogenous group." ATSA Br. 8.

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[11] "[A]lthough most sex offenders show traits of personality disorders and although there are subgroups representing the seriously mentally ill and developmentally disabled, most sex offenders do not show major psychiatric disorders. . . . Only the paraphilic diagnoses focus directly on psychopathological features of deviant sexual behavior, but these conditions appear to be absent in most offenders. In contrast, a significant number of sex offenders may have substance abuse or personality disorder diagnoses, but these conditions usually have little explanatory connection to the offender's sexual behavior." APA Task Force Report 7, 9.

And, in any event, it does not say what "effective" means, or whether treatments are "effective" when conducted in prison or prison-like settings, or whether any treatments are more than simply something a doctor or other professional might do to an individual hoping (with some basis) for some kind of "improvement," but actually hold significant potential to reduce the risk of recidivism to a level that would allow release.

For cases like the present, there is, in fact, no basis for identifying recidivism-reducing treatments or concluding that a State could provide "treatment" holding realistic promise of release. As one of ATSA's principal sources has written, "evaluators have had little success in determining whether sexual offenders have benefited from treatment"; and although the literature identifies some "useful direction on how to assess sexual offenders' long-term risk for recidivism[,] almost all of the documented risk factors . . . are static or extremely stable variables," so "[f]ew of the identified risk factors have even the potential for change, and, for those that can change, it is unclear whether reductions in the problem areas actually lead to reductions in recidivism," the net result being that "the available research can be used to justify committing sexual offenders, but it provides little direction as to when they can safely be released." Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 Psychol., Pub. Policy & L. 50, 68 (1998); APA Task Force Report 175 ("to date there is no clear basis for making the claim that treatment of any class of patients with paraphilias will result in lower rates of recidivism"). ATSA itself does not assert that its members would consider involuntary hospitalization for such "treatment" to be medically (or professionally) justifiable. *See* APA Task Force Report 175 ("confinement without a reasonable prospect of beneficial treatment of the underlying disorder is nothing more than preventive detention and violates the norms of the medical model"). Kansas's statute, indeed, declares that it was

enacted to cover individuals for whom normal civil-commitment standards cannot be met. Kan. Stat. Ann. § 59-29a01; *see Hendricks*, 521 U.S. at 351.

Equally important, the evidence on "treatment" does nothing to distinguish "sexual predators" who might qualify under Kansas's statute from offenders generally. A recent Government-sponsored summary of the research literature indicates a comparable availability of "treatments" that might be effective in reducing recidivism among offenders, with no special limitation to sex offenders. MacKenzie, "Criminal Justice and Crime Prevention," in University of Maryland Department of Criminology and Criminal Justice, *Preventing Crime: What Works, What Doesn't, What's Promising* ch. 9 (U.S. Dep't of Justice Office of Justice Programs Research Report, a Report to Congress prepared for National Institute of Justice 1997).[12] Critically, then, not only does the

[12] The 1997 report (at page 9-16) states: "Today, while there is still some debate about the effectiveness of rehabilitation (e.g., Lab and Whitehead 1988; Whitehead and Lab 1989) recent literature reviews and meta-analyses demonstrate that rehabilitation programs can effectively change offenders (Andrews and Bonta 1994; Andrews, Bonta, and Hoge 1990; Andrews, Zinger, Hoge, Bonta, Gendreau, and Cullen 1990; Palmer 1975; Gendreau and Ross 1979, 1987). In general, according to Andrews et al. (1990), reviews of the literature show positive evidence of treatment effectiveness. For example, in a series of literature reviews, the proportion of studies reporting positive evidence of treatment effectiveness varied from near 50 percent to 86 percent: 75 percent (Kirby 1954), 59 percent (Bailey 1966), 50 percent (Logan 1972), 48 percent (Palmer's 1975 retabulation of studies reviewed by Martinson in 1974), 86 percent (Gendreau and Ross 1979) and 47 percent (Lab and Whitehead 1988). In reviewing these studies, Andrews *et al.* (1990) conclude that 'This pattern of results strongly supports exploration of the idea that some service programs are working with at least some offenders under some circumstances.' The important issue is not whether something works but what works for whom." The report summarizes (at page 9-49): "There is now substantial evidence that rehabilitation programs work. There is a body of research supporting the conclusion that some treatment programs work with at least some offenders in some situations.".

evidence on "treatment" fail to bring this statute within the paternalistic justification for traditional justifiable civil commitment but also fails to supply a limiting principle that would make upholding the confinement here stop short of generally authorizing preventive detention of offenders.

5. *Hendricks* itself involved a combination of two factors that together form a limiting principle: (a) a highly objective and near-certain prediction of imminent danger (b) based on inability to exercise self-control. Those factors, in *Hendricks*, inhered in a single fact, namely, Hendricks's own testimony of his inability to stop himself from re-offending. By virtue of that fact, Hendricks was analogous to the highly contagious individual—presenting an "imminent danger" according to "high medical authority" and not through voluntary human action—whose quarantine (at least temporarily) might be justified. *Jacobson*, 197 U.S. at 29, 30 (upholding mandatory vaccination); *see Hendricks*, 521 U.S. at 357; *id.* at 366 (citing *Compagnie Francaise*, *supra*).

The State, in the trial court, successfully resisted the incorporation of this limiting principle into the standards to be applied to Crane. In this Court, the State denies that *Hendricks* actually relied on such a limiting principle, but that denial, as explained above, cannot easily be squared with the *Hendricks* opinion. Moreover, the State's substantive argument against the *Hendricks* standard does not withstand scrutiny.

Citing quotations included in the APA's *amicus* brief in *Hendricks*, the State stresses that there may be no scientifically valid way to "'measur[e]'" or "'calibrat[e]'" degrees of volitional control or even to locate a clear "'line'" on one side of which are precisely those with such control and on the other those without. *See* APA *Amicus* Br. in *Hendricks* at 25-26 n.22, quoted at Pet. Br. 26, 28; *see also* ATSA *Amicus* Br. 3-7. Those imprecisions, in the APA's view, remain characteristic of the notion of volitional control

today. Indeed, the APA (like others) has relied on them to justify a policy choice to abandon the use of the concept for various legal purposes in favor of other standards, as with the insanity defense. As a simple logical matter, however, the inability to make the notion operationally precise across the full range of human behavior does not mean that the idea of volitional control lacks a coherent ordinary meaning or that some version of it cannot reasonably be used in law at all or that there are not clear cases at the ends of the spectrum, any more than that "day" and "night" are meaningless or useless or indistinguishable concepts simply because light fades gradually at twilight and dusk.

The Court's opinion in *Hendricks* itself establishes both the common-sense coherence and the actual use of the notion of volitional control, a concept on which the Court relied numerous times. *See* pages 11-15, *supra*. The dissent, too, used the notion. 521 U.S. at 375-76 ("inability to control his actions"; "irresistible impulse"). The notion of impaired capacity to control conduct, moreover, was incorporated into the once widely accepted formulation of the insanity defense in the 1962 Model Penal Code § 4.01: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he *lacks substantial capacity* either to appreciate the criminality [wrongfulness] of his conduct or *to conform his conduct to the requirements of the law*." (Emphasis added). Although that test has been altered in many jurisdictions, based in part on the difficulties of plenary use of volitional control,[13] that policy choice does

[13] The APA stated in 1982: "Many psychiatrists . . . believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether a defendant was able to control his behavior. The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk. . . . The concept of volition is the subject of some

not imply or prove the incoherence of the concept or its uselessness in any limited version.[14]

On the other hand, the very imprecisions of measuring degrees of volitional control do suggest that the idea cannot be fairly used to attach (profound) legal consequences unless the standard is set near the far end of the spectrum. As Kansas now insists, it is in the wide middle range of non-extreme cases that volitional "impairment" would present substantial problems of consistent, workable, objective application. Kansas does not suggest that a standard infected by such difficulties could, along with no more than likely recidivism, constitutionally be used to lock someone up indefinitely.

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disagreement among psychiatrists. Many psychiatrists therefore believe that psychiatric testimony (particularly that of a conclusory nature) about volition is more likely to produce confusion for jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding." *American Psychiatric Association Statement on the Insanity Defense*, 140 Am. J. Psychiatry 681, 685 (1983) (emphasis added).

The APA further explained that reliance for an insanity defense on "'personality disorders' such as antisocial personality disorder (sociopathy) does not accord with modern psychiatric knowledge or psychiatric beliefs concerning the extent to which such persons do have *control over their behavior*." *Id.* (emphasis added). The APA, recommending a requirement of serious mental disorder of the severity of a psychosis and exclusive focus on ability to appreciate the wrongfulness of the conduct, added: "In practice there is considerable overlap between a psychotic person's defective understanding or appreciation and his ability to control his behavior. Most psychotic persons who fail a volitional test for insanity will also fail a cognitive-type test when such a test is applied to their behavior, thus rendering the volitional test superfluous in judging them." *Id.* at 685.

[14] *Amicus* ATSA (at 7) seems to suggest that its position is that an individual's "desires, thoughts, and feelings" are "inaccessible" in any sense relevant to the law. It is unclear what, under that position, would be left of the narrowed insanity defense, let alone ordinary civil commitment processes (or of "intent" throughout the law).

This Court in *Hendricks* carefully avoided those problems—without denying the difficulties of fine-tuning the volitional-control notion for general use, despite citing the page of the APA brief making the point (521 U.S. at 360 (citing APA *Amicus* Br. 26))—by repeatedly invoking not just some impairment but actual "inability to control," as proved to a high degree of certainty by Hendricks's own admission. *See* pages 11-15, *supra*; *see also* 521 U.S. at 375 (Breyer, J., dissenting) ("highly unusual inability to control his actions") (the portion of the dissent stating the area of agreement with the majority). That formulation reflects a key precedent relied on in *Hendricks* (521 U.S. at 358), namely, the 1940 *Pearson* case. The law upheld there applied only if the person was so severely impaired as to be rendered "'irresponsible for his conduct with respect to sexual matters'" by his mental condition (309 U.S. at 272), and this Court pointedly premised its constitutional ruling on its acceptance of the Minnesota Supreme Court's "construction" of the law as applying only to a category of "'persons who, by an habitual course of misconduct in sexual matters, ha[d] evidenced *an utter lack of power to control* their sexual impulses," causing them to be "likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their *uncontrolled and uncontrollable* desire.'" 309 U.S. at 273 (emphasis added); *see id.* at 274 (again stressing these requirements). Thus, *Hendricks* and *Pearson*, together with the need to avoid the difficulties that (as Kansas recognizes) afflict lesser versions of a "volitional impairment" standard, support a limiting principle of such severe impairment as to avoid the large gray area: inability to control the conduct, as proved with a high degree of certainty. Crane's confinement was not based on this or any other meaningful limiting principle.

CONCLUSION

The judgment of the Supreme Court of Kansas should be affirmed.

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